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Constitutional Law - Right of Free Speech - Tinker v. Independent Community School District, 89 S. Ct. 733 (1969)

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vanced development.[17] By holding the contractor liable, the court has, in effect, made the home purchaser an equal to the chattel purchaser in the field of vendee's protection. In so doing, the court noted that there was no meaningful distinction between the mass production and sale of automobiles and homes, and that the pertinent overriding policy considerations were the same. The court felt that the public interest dictated this result and that the ancient legal distinctions that make no sense in today's society should be discarded in the law's growth to meet the changing needs and mores of our contemporary world.[18]

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Constitutional Law—RIGHT OF FREE SPEECH—*Tinker v. Independent Community School District*, 89 S. Ct. 733 (1969).

Plaintiffs, minor school children, sought to enjoin local school authorities from enforcement of a regulation prohibiting the wearing on school premises of black armbands in protest of the war in Viet Nam.[1] The district court dismissed the complaint, thus upholding the action of the school authorities,[2] and a divided court of appeals affirmed.[3] The Supreme Court granted certiorari[4] to consider the question of whether or not the action of the school authority in this case was a permissible limitation of the right of free speech guaranteed to citizens of states by the first and fourteenth amendments.

The Supreme Court, following the holding of the Fifth Circuit in *Burnside v. Byars*,[5] held that for the school authority to justify the abridgment of the right to free speech,[6] school officials must be able to

17. The court cited Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) as authority for its decision. In *Schipper*, the court held that the builder-vendor was liable to the purchaser on the basis of strict liability for personal injury. In *Kriegler*, the damage was to property. *See* 51 CORNELL L. Q. 389 (1966); 41 WASH. L. REV. 166 (1966).

18. Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

1. 89 S. Ct. 733 (1969). The ages of the children ranged from thirteen to sixteen; their protest was part of an organized group including both adults and children.

2. 258 F Supp. 971 (S.D. Iowa 1966).

3. 383 F.2d 988 (8th Cir. 1967).

4. 390 U.S. 942 (1968).

5. 363 F.2d 744 (5th Cir. 1966).

6. Id. at 748:

> [School officials] cannot infringe upon their students' right to free and unrestricted expression as guaranteed them under the First Amendment where the exercise of such rights in the school buildings and school rooms

show that such limitation was necessary to maintain proper discipline and decorum within the school, and that the prohibited conduct would "materially and substantially interfere" with such maintenance of order.[7]

The Supreme Court, in *Tinker*, continues the application of basic principles laid down in *Dennis v. United States*[8] and *Cantwell v. Connecticut*[9] where it is apparent that for speech, symbolic or verbal, to be the proper subject of state abridgment, there must not only be some "substantial state interest" [10] at stake, but such speech (or conduct amounting to speech) must inevitably lead to acts adverse to the state interest sought to be protected.[11] Thus having begun with the premise that constitutional freedoms may be to some extent qualified,[12] courts have preferred to decide on a case by case basis[13] whether a particular limitation is or is not justifiable.[14]

Moreover, courts have expressed reluctance to interfere in cases involving school regulations,[15] preferring, on the other hand, to allow local authorities "broad discretion." [16] Interference is felt to be justified only if fundamental rights are in jeopardy [17] Laws, it is said, "must not be such as cast a pale of orthodoxy over the classroom." [18] Thus

does not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.

Burnside also said that the mere presence of the symbol was not enough to warrant prohibition without some accompanying student misconduct. *Id.*

7. *Id.*, *see also* Hammond v. South Carolina State College, 272 F Supp. 947 (C.D. S.C. 1967).

8. 341 U.S. 494 (1951).

9. 310 U.S. 296 (1939).

10. 341 U.S. 494 (1951); Cantwell v. Connecticut, 310 U.S. 296 (1939); Whitney v. California, 274 U.S. 357 (1927); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966); University Comm'n to End War in Viet Nam v. Gunn, 289 F Supp. 469 (D.C. Tex. 1968); Hammond v. South Carolina State College, 272 F Supp. 947 (C.D. S.C. 1967); Davis v. Firment, 269 F Supp. 524 (E.D. La. 1967)

11. Brown v. Louisiana, 381 U.S. 131 (1966); *see also* Edwards v. South Carolina, 372 U.S. 329 (1963); Thornhill v. Alabama, 310 U.S. 88 (1940).

12. *E.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1939).

13. Ferrell v. Dallas Independent School Dist., 392 F.2d 697 (5th Cir. 1968). *See generally* Note, *Academic Freedom*, 81 HARV. L. REV. 1045, 1128-57 (1968).

14. *See generally* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1968).

15. *E.g.*, Epperson v. Arkansas, 89 S. Ct. 266 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).

16. Tinker v. DeMoines Independent Community School Dist., 89 S. Ct. at 746 (1969) (Harlan J., dissenting opinion); Burnside v. Byars, 363 F.2d at 747-48.

17. Epperson v. Arkansas, 89 S. Ct. 266 (1966).

18. Keyishian v. Board of Regents, 385 U.S. 589 (1967).

the various tests applied by the courts determine the validity of a school regulation in terms such as "reasonableness," [19] "necessity," [20] and "arbitrariness," [21] based on the presence or absence of a "substantial state interest." [22] Finally, as expressed in *Burnside*[23] and *Tinker*,[24] prohibited conduct must be such as "materially and substantially interferes" with the operation of the school.[25] A "silent, passive expression of opinion, unaccompanied by any disorder or disturbance" [26] will not be enough to justify prohibition. Prior to *Tinker*, moreover, the burden has been on the complaining party to show conditions rendering the regulation invalid.[27]

The ultimate effect of *Tinker* is to clearly adopt the *Burnside* rationale, placing the burden of justification squarely upon the regulating authority.[28] Moreover, it is clear that where the authority seeks to outlaw the expression of a particular opinion it must be able to show that such expression has an inherent tendency to disrupt or that it has actually led to disruption of school routine.[29] In the absence of actual dis-

19. Burnside v. Byars, 363 F.2d at 748; Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).

20. Ferrell v. Dallas Independent School Dist., 392 F.2d 697 (5th Cir. 1968).

21. Hammond v. South Carolina State College, 272 F. Supp. 947 (C.D. S.C. 1967).

22. Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

23. What is a reasonable regulation? It is " one which measurably contributes to the maintenance and decorum within the educational system." *Id.* at 748.

24. *Compare* Tinker v. DeMoines Independent Community School Dist., 89 S.Ct. 733 (1969) with Brown v. Louisiana, 383 U.S. 131 (1966).

25. 89 S. Ct. 733 (1969).

26. Tinker v. DeMoines Independent School Dist., 89 S. Ct. 733, 737 (1969) with Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966).

27. Burnette v. Nix, 244 Ark. 235, 424 S.W.2d 537 (1968). See also the dissenting opinion of Justice Harlan in *Tinker*, 89 S. Ct. at 738.

28. Tinker v. DeMoines Independent School Dist., 89 S. Ct. 733 (1969). In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly there is no finding and no showing that the exercise of the forbidden right would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. Burnside v. Byars, 363 F.2d at 749; Tinker v. DeMoines Independent School Dist., 89 S. Ct. 733 (1969).

29. Tinker v. DeMoines Independent School Dist., 89 S. Ct. 733 (1969). The armbands were forbidden, but other forms of symbolic speech were permitted. No disturbance was attributed to the presence of the armbands; *accord*, Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); *see also* Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966). In this case the regulation singled out a specific opinion, but the abridgment of the right was upheld because of disturbance directly attributable to the expression of the opinion.

turbance causally connected with the expression of an opinion or opinions, it must be shown that some deleterious effect upon school discipline will inevitably result.[30]

Leaving unanswered the question of the degree to which the constitutional rights of children are co-extensive with those of adults, *Tinker* continues the application of the *Burnside* rule, clearly emphasizing the shift in the burden of proving the constitutional validity of a challenged regulation to the promulgating authority

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30. "[B]ut, in our system, undifferentiated fear or apprehension or disturbance is not enough to overcome the right to freedom of expression." 89 S. Ct. at 737. The conclusion of the Court would seem to be that in the absence of an obvious inherent tendency to disrupt, it must be shown that the proscribed conduct actually caused some disturbance.